STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 2, 2015
v	No. 321584 Wayne Circuit Court
DARNELL JAJUAN MADDOX, Defendant-Appellant.	LC No. 12-000936-FH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of 50 to 449 grams of cocaine (possession of cocaine), MCL 333.7403(2)(a)(*iii*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 78 months to 20 years' imprisonment for the possession of 50 to 449 grams of cocaine conviction and two years' imprisonment for his felony-firearm conviction. We affirm in part and remand in part.

Defendant was charged with three criminal offenses: count 1, possession with intent to deliver 50 to 449 grams of cocaine; count 2, possession of 50 to 449 grams of cocaine; and count 3, felony-firearm. The judgment of sentence in this case contains multiple errors, including the manner of conviction and the crimes for which defendant was convicted. The judgment of sentence reflects that the manner of conviction was by guilty plea; however, defendant was convicted by a jury. The Judgment of Sentence reflects that "count 1," possession with intent to deliver 50 to 449 grams of cocaine, was dismissed. The transcripts reflect that the jury found defendant guilty on all three charges; there was no discussion of dismissing a charge. Upon review of this case, we agree that a conviction should be vacated, but it is the conviction for possession of 50 to 449 grams of cocaine, as such a conviction violates principles of double jeopardy. The conviction for possession with intent to deliver 50 to 449 grams of cocaine should not have been dismissed, and the judgment of sentence shall be amended to reflect that correction.

Defendant argues that the prosecution failed to present legally sufficient evidence to support the convictions for possession with intent to deliver 50 to 449 grams of cocaine, possession of 50 to 449 grams of cocaine, and felony-firearm. Defendant acknowledges he was present at the home when police executed the search warrant and discovered cocaine and a semi-

automatic weapon within one foot of where defendant was standing. He argues, however, that he was not in possession of the items, and therefore, there was insufficient evidence introduced below to support his convictions. We disagree.

We review challenges to the sufficiency of the evidence introduced below applying a de novo standard of review. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Applying this standard, evidence is viewed in "the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* at 619. In reviewing the sufficiency of the evidence, this Court must not interfere with the jury's role as the fact-finder. *Id.* at 619.

For a defendant to be convicted of possession with intent to deliver a controlled substance, the prosecution must prove beyond a reasonable doubt "(1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

The element at issue before us was the fourth element of the crime–possession with intent to deliver. At trial, defendant argued that he was not in possession of the cocaine, that he was merely present in the home where the drugs were found. In *McGhee*, 268 Mich App at 622-623, in analyzing a conviction for possession with intent to deliver a controlled substance, this Court considered the issue of actual possession versus constructive possession: "Actual physical possession is not required to meet the possession element. Instead, possession may be either actual or constructive. Constructive possession of an illegal substance signifies knowledge of its presence, knowledge of its character, and the right to control it." (Citations omitted.) The evidence introduced below established that defendant was found in the kitchen, within one foot of two baggies containing a white substance that resembled — and tested positive for — cocaine, a digital scale, and a semi-automatic handgun. The amount of drugs found on the counter near defendant was identified as a "big," with a street value of $7,000 to $8,000. "Possession can be established with circumstantial or direct evidence, and the ultimate question of possession is a factual inquiry 'to be answered by the jury.' " *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010), quoting *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). After receiving evidence that defendant was the only person in proximity to the drugs and had the ability to exercise control over them, the jury found that he possessed the drugs.

There was sufficient evidence to support defendant's conviction for possession with intent to deliver 50 to 449 grams of cocaine. There is no evidence or other discussion in the record to reflect why this count was listed as dismissed on the Judgment of Sentence. As discussed below, the judgment of sentence shall be amended to reflect the reinstatement of this conviction.

There was sufficient evidence to support defendant's conviction for possession of 50 to 449 grams of cocaine. In *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984), this Court stated: "The offense of possession of a controlled substance requires proof that defendant had actual or constructive possession of the substance. Possession may be established by evidence that defendant exercised control or had the right to exercise control of the substance and knew that it was present." Defendant and the prosecution stipulated at trial that the

controlled substance found in the home was cocaine. Police found defendant within a foot of the two bags of cocaine. Defendant had the right to exercise control over the cocaine. Viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant constructively possessed the cocaine, and thus, there was sufficient evidence to support his conviction on this charge.

According to the prosecution's brief filed with this Court, the prosecution concedes that possession of cocaine is a lesser included offense of possession with intent to deliver 50 to 449 grams of cocaine. The prosecution argues that, upon the jury returning a guilty verdict on possession with intent to deliver 50 to 449 grams of cocaine, the possession of 50 to 449 grams of cocaine conviction should have been vacated. We agree.

In *People v Fowlkes*, 130 Mich App 828, 832-833; 345 NW2d 629 (1983), this Court stated:

> In deciding a double jeopardy question, Michigan courts focus on the factual proofs involved. When tried for an action which includes lesser included offenses, if the jury finds guilt of the greater, the defendant may not additionally be convicted separately of the lesser included offense. Thus, under Michigan law, if, factually, the convictions are based on proof of a single act, the separate crimes are held to consist of nothing more than a greater crime and certain of its lesser included offenses. In such a case, multiple convictions cannot be allowed to stand. [Citations omitted.]

Based upon established principles of double jeopardy, this case is remanded to the trial court to vacate the conviction for possession of 50 to 449 grams of cocaine and to reinstate defendant's conviction for possession with intent to deliver 50 to 449 grams of cocaine.[1]

Lastly, defendant was also convicted of felony-firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The felony in this case is possession with intent to deliver 50 to 449 grams of cocaine. The sufficiency of the evidence to support that conviction was analyzed previously; there was sufficient evidence to support that conviction.

The only question that relates to the felony-firearm charge is whether defendant knowingly possessed a firearm at the time he committed the crime of possession with intent to deliver 50 to 449 grams of cocaine. Again, the element of possession to sustain this conviction does not require actual possession; it can be constructive possession. Our Supreme Court has "described constructive possession of an article in the context of firearms as when 'there is proximity to the article together with indicia of control.' " *Flick*, 487 Mich at 14, quoting *Hill*,

[1] Based on the trial court's statements at sentencing, it does appear that, although the simple possession conviction was not formally vacated, the trial court only sentenced on the possession with intent to deliver and felony-firearm convictions.

433 Mich at 470. This Court has interpreted the felony-firearm statute to "prohibit the defendant from having a firearm on his person during the commission of a felony and also prohibits the defendant from having a firearm available and accessible to him during the felony so that it is obtainable by him if he should need it." *People v Terry*, 124 Mich App 656, 659; 335 NW2d 116 (1983). The testimony established that there was a semi-automatic weapon within a foot of where defendant was standing when police entered the home. The weapon, a .50 caliber Desert Eagle handgun, was loaded, on a shelf, with the barrel facing in and the handle facing out, ready to be accessed by defendant, if needed. There was sufficient evidence introduced to support defendant's felony-firearm conviction.

We affirm defendant's convictions for possession with intent to deliver 50 to 449 grams of cocaine and felony-firearm. We remand for the lower court to: 1) formally vacate the conviction of the lesser offense of simple possession; 2) enter a corrected judgment of sentence that reflects that defendant was sentenced on the conviction for possession with intent to deliver 50 to 449 grams of cocaine and 3) reflects that defendant was convicted by a jury verdict, not a guilty plea. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood